Multimarket Sdn Bhd v The Owners and/or Other Persons Interested in the Vessel 'RUSILLAH 1'

HIGH COURT (MIRI) — ADMIRALTY IN REM NO 27–01 OF 2008(MR)
ZULKIFLI BAKAR J
30 NOVEMBER 2010

Shipping and Navigation — Action in rem — Arrest of ship — Claim against owners and others interested in ship — Damages to plaintiff's vessel because of alleged collision with defendant's vessel — Whether plaintiff discharged its burden — Whether proven on balance of probabilities collision caused by defendant's vessel — Counterclaim for wrongful arrest — Whether plaintiff acted with mala fide or malice when arresting defendant's vessel

The plaintiff, who was at all material times the owner of the vessel known as EUREKA III ('the plaintiff's vessel') commenced an action against the owners of the vessel known as RUSILLAH 1 ('the defendant's vessel'). It was the plaintiff's claim that on 31 March 2008, the defendant's vessel had collided into the plaintiff's vessel whilst attempting to berth alongside it thereby causing damages amounting to RM90,000 to the plaintiff. The damages of RM90,000 were in respect of repairs to the plaintiff's vessel as a result of the said collision and losses arising from the loss of a Petronas charter. The defendant denied the plaintiff's assertions and counterclaimed against the plaintiff for the wrongful arrest of its vessel. The defendant alleged that it had paid RM229,000 into court to secure the release of its vessel, which had been wrongfully detained by the plaintiff. During the trial it was found that the plaintiff's version of events contradicted the defendant's. The plaintiff's director and operation manager testified that she had received a telephone call from the plaintiff's technical superintendent ('the plaintiff's TS') informing her that the defendant's vessel had rammed into the plaintiff's vessel during its attempt to berth alongside it. She also said that the captain of the defendant's vessel ('the captain'), who was steering the defendant's vessel at the material time, had admitted to the collision in the presence of the plaintiff's TS, the plaintiff's managing director and the Indonesian crew of EUREKA III. The Indonesian crew members were however unable to be called to support this version because they had left the employment of the plaintiff and were untraceable to date. The plaintiff also submitted that the defendant had promised to make arrangements to repair the plaintiff's vessel but that it had since reneged on its promise. The defendant's witness testified that he was on board the defendant's vessel at the material time and that the vessel, which was being steered by the captain, did not collide with the plaintiff's vessel or with any other vessel during the berthing process. In the

light of the two conflicting accounts the court had the onerous task of deciding which of the two versions were probable and to be believed.

Held, dismissing the plaintiff's action with costs to be taxed and dismissing the defendant's counterclaim with costs to be taxed:

(1) The captain of the defendant's vessel had testified that he did not realise or feel that the defendant's vessel had collided into the plaintiff's vessel whilst he was attempting to berth alongside it and that he was only informed later after he had berthed the vessel that there was a dent on the plaintiff's vessel. However, the Indonesian crew members of the plaintiff's vessel, who had informed the captain about the collision, were now all untraceable. On the other hand the defendant's eyewitness had testified that there was no collision between the two vessels. Thus, the captain as the plaintiff's witness had contradicted the case for the plaintiff in respect of the collision between the two vessels. However, the evidence of both the defendant's eyewitness and the captain was consistent in that the captain while attempting to berth alongside the plaintiff's vessel did not realise that he had collided into it. As such, it was found that the captain's evidence was not conclusive in respect of whether there was a collision or not between the defendant's vessel and the plaintiff's vessel and that his evidence was at best neutral. The evidence of the eyewitness, which was positive, prevailed over the captain's evidence (see paras 10–12).

(2) The plaintiff's other witnesses did not witness the alleged collision between the two vessels but only heard of the collision from the Indonesian crew who were all now untraceable. In the circumstances the plaintiff, who asserted that the defendant's vessel had collided into the plaintiff's vessel, could not positively adduce evidence of such a collision and failed to discharge its burden of proof (see para 13).

(3) The omissions on the part of the plaintiff to make an entry in the logbook of its vessel and to lodge a collision report were not proof of the fact that the plaintiff had acted with mala fide or malice when arresting the defendant's vessel. After considering the evidence in its totality it was found that the defendant had not presented any evidence to establish mala fide or malice on the part of the plaintiff. The fact that the plaintiff had failed in its action against the defendant did not automatically mean that there was a wrongful arrest of the defendant's vessel by the plaintiff. As such, the defendant had failed on a balance of probabilities to prove its counterclaim (see paras 14, 14(a), (b), (d) & 17).

[Bahasa Malaysia summary

Plaintif, yang pada kesemua masa material adalah pemilik kapal yang dikenali sebagai EUREKA III ('kapal plaintif') memulakan tindakan terhadap

pemilik-pemilik kapal dikenali sebagai RUSILLAH 1 ('kapal defendan'). Ia adalah tuntutan plaintif bahawa pada 31 Mac 2008, kapal defendan telah melanggar kapal plaintif apabila hendak berlabuh di sebelahnya menyebabkan ganti rugi berjumlah RM90,000 kepada plaintif. Ganti rugi RM90,000 tersebut berkaitan pembaikan kepada kapal plaintif akibat perlanggaran tersebut dan kerugian berbangkit daripada kerugian carter Petronas. Defendan menafikan penegasan plaintif dan menuntut balas terhadap plaintif kerana penahanan salah kapalnya. Defendan berhujah bahawa ia membayar RM229,000 kepada mahkamah untuk menjamin pelepasan kapalnya, yang ditahan secara salah oleh plaintif. Semasa perbicaraan ia didapati bahawa versi plaintif mengenai kejadian bercanggah dengan defendan. Pengarah plaintif dan pengurus operasi memberi keterangan bahawa dia telah menerima panggilan telefon daripada superintenden teknikal plaintif ('ST plaintif') memberitahunya bahawa kapal defendan telah merempuh kapal plaintif semasa percubaannya untuk berlabuh di sebelahnya. Dia juga menyatakan bahawa kapten kapal defendan ('kapten'), yang mengemudi kapal defendan pada masa material, telah mengaku tentang perlanggaran tersebut di hadapan ST plaintif, pengarah urusan plaintif dan anak kapal berbangsa Indonesia EUREKA III. Anak-anak kapal berbangsa Indonesia itu walau bagaimanapun tidak dapat dipanggil untuk menyokong versi ini kerana mereka telah berhenti kerja dengan plaintiff dan sehingga kini tidak dapat dikesan. Plaintif juga berhujah bahawa defendan telah berjanji untuk menguruskan pembaikian kapal plaintif tetapi ia telah memungkiri janjinya. Saksi defendan memberi keterangan bahawa dia berada di atas kapal defendan pada masa material dan bahawa kapal tersebut, yang mana dikemudikan oleh kapten, tidak berlanggar dengan kapal plaintif atau dengan mana-mana kapal lain semasa proses berlabuh. Berdasarkan kedua-dua penjelasan yang bercanggah mahkamah mempunyai tugas yang membebankan dalam menentukan versi yang mana yang mungkin dipilih dan untuk mempercayai.

Diputuskan, menolak tindakan plaintif dengan kos ditetapkan dan menolak tuntutan balas defendan dengan kos ditetapkan:

(1) Kapten kapal defendan telah memberi keterangan bahawa dia tidak sedar atau berasa bahawa kapal defendan telah berlanggar dengan kapal plaintif apabila dia mencuba untuk berlabuh di sebelahnya dan dia hanya diberitahu selepas dia melabuhkan kapal tersebut bahawa terdapat kesan kemik pada kapal plaintif. Walau bagaimanapun, anak-anak kapal berbangsa Indonesia kapal plaintif, yang memberitahu kapten tersebut mengenai pelanggaran, sekarang ini tidak dapat dikesan. Sebaliknya saksi defendan telah memberi keterangan bahawa tidak terdapat perlanggaran di antara kedua-dua kapal tersebut. Oleh itu, kapten tersebut sebagai saksi plaintif telah menyangkal kes plaintif berkaitan perlanggaran di antara kedua-dua kapal tersebut. Walau bagaimanapun, keterangan kedua-dua saksi defendan dan kapten tersebut adalah konsisten di mana

kapten tersebut apabila mencuba untuk berlabuh di sebelah kapal plaintif tidak sedar yang dia telah melanggarnya. Oleh itu, ia didapati bahawa keterangan kapten tidak konklusif berkaitan sama ada terdapat pelanggaran atau tidak di antara kapal defendan dan kapal plaintif dan bahawa keteranganya adalah berkecuali. Keterangan saksi-saksi, yang mana adalah positif, mengatasi keterangan kapten tersebut (lihat perenggan 10–12).

(2) Saksi-saksi plaintif yang lain tidak menyaksikan perlanggaran yang didakwa di antara kedua-dua kapal tersebut tetapi hanya mendengar mengenai pelanggaran tersebut daripada anak kapal berbangsa Indonesia yang kesemuanya sekarang tidak dapat dikesan. Dalam keadaan ini, plaintif, yang menegaskan bahawa kapal defendan telah berlanggar dengan kapal plaintif, tidak dapat secara positif mengemukakan keterangan mengenai perlanggaran sedemikian dan gagal untuk melepaskan beban pembuktian (lihat perenggan 13).

(3) Peninggalan oleh plaintif untuk membuat catatan di dalam buku log kapalnya dan untuk membuat laporan perlanggaran bukan bukti fakta bahawa plaintif telah bertindak dengan mala fide atau niat jahat apabila menahan kapal defendan. Selepas mempertimbangkan keterangan dalam keseluruhannya, didapati bahawa defendan tidak mengemukakan apa-apa keterangan untuk membuktikan mala fide atau niat jahat oleh plaintif. Fakta bahawa plaintif gagal dalam tindakannya terhadap defendan tidak secara automatik bermaksud terdapat penahanan salah kapal defendan oleh plaintif. Oleh itu, defendan gagal atas imbangan kebarangkalian untuk membuktikan tuntutan balasnya (lihat perenggan 14, 14(a), (b), (d) & 17).]

Notes

For cases on arrest of ship, see 11 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 966–973.

Cases referred to

Centro Latino Americano de Commercio Exterior SA v Owners of the ship 'Kommunar' (the 'Kommunar') (No 3) [1997] 1 Lloyd's Rep 22 (refd)

Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd; The Kingswood [1941] 2 All ER 165, HL (refd)

Lee Wong Yu & Ors v The owners of the ship or vessel, 'MV Hua Hong Satu' [1999] 6 CLJ 197, HC (refd)

'Loon Sheng', The; Eng Hong Trading Co Sdn Bhd v The 'Loon Sheng' owners & Ors [1979] 2 MLJ 179, HC (refd)

Maule, The [1995] 2 LRC 192, CA (refd)

Nanyang Development (1966) Sdn Bhd v How Swee Poh [1970] 1 MLJ 145, FC (refd)

Ocean Gain Shipping Pte Ltd v Owner and/or charterer of demise of vessel Dong Nai registered at Haiphong Port, Vietnam (the Dong Nai) [1996] 4 MLJ 454, HC (refd)

Owners of cargo lately laden on board the 'Euroexpress', The v The 'Euroexpress' (owner of) (Banque Indosuez & Anor, interveners) [1988] 3 MLJ 367, CA (refd)

Walter Turnbull and others v The owners of the ship 'Strathnaver', her cargo and freight (1875) 1 App Cas 58, PC (refd)

Xenos v Aldersley (The Evangelismos) (1858) 12 Moo PCC 352 (refd)

Legislation referred to

Evidence of Act 1950 s 101

Merchant Shipping Ordinance 1952 ss 199(1)(m), 253(1), 255

Kenny Yi (Yi & Co) for the plaintiff.
Gabriel Kok (Khoo & Co) for the defendant.

Zulkifli Bakar J:

[1] I have heard the evidence of witnesses adduced by the plaintiff and the defendant in this trial and considered the documentary evidence in support for each party. At the outset I must say that the versions of the plaintiff's directly contradicted the versions of the defendant's in that the plaintiff claimed there was a collision or friction between their vessel EUREKA III with the vessel of the defendant RUSILLAH 1 in the morning of 31 March 2008 at about 7am–8am whilst the defendant claimed there was no collision or friction at all and the damage as alleged by the plaintiff on EUREKA III (if any) were not caused by RUSILLAH 1.

[2] In such situation, bearing in mind that I have to decide the matter on balance of probability, what I need to do is to weigh the two conflicting evidence and decide which of the two versions are probable and to be believed. In doing so, it is not a matter of which party calls more witnesses in numbers but the evidence of the said witnesses for the plaintiff and the defendant and have them tested with other relevant and material evidence before the court.

[3] It is trite and basic rule of evidence that whoever asserts a certain fact bears the burden of proving it as stated under s 101 of the Evidence of Act 1950. It suffice for me to cite the case of *Nanyang Development (1966) Sdn Bhd v How Swee Poh* [1970] 1 MLJ 145 where Azmi LP speaking on behalf of the Federal Court said:

> ... the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it: for a negative is usually incapable of proof.

[4] The above judgment was based on the rule that had been enunciated since the time of memorial in common law as evidenced in the case of *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd; The Kingswood* [1941] 2 All ER 165 at p 179 when Viscount Maugham said:

> ... I think the burden of proof in any particular case depends on the circumstances in which the claim arises. In general the rule which applies is *ei qui affirmat non ei qui negat incumbit probatio*. It is an ancient rule founded on considerations of good sense, and it should not be departed from without strong reasons.

[5] Essentially in the instant case before me, the plaintiff asserts that the defendant's vessel (RUSILLAH 1) had collided into the plaintiff's vessel (EUREKA III) on 31 March 2008 during its attempt to berth alongside it and thereby caused damages to the plaintiff's vessel (EUREKA III) amounting to RM90,000 for its repairs and RM110,000 in its loss of Petronas charter. To this assertions the defendant denied and counterclaimed against the plaintiff for the wrongful arrest of RUSILLAH 1 by the plaintiff for which the defendant had paid RM229,000 into court to secure the release of its vessel RUSILLAH 1.

[6] In support of their claims the plaintiff called five witnesses namely:

(a) Kiu Ngin Zein ('PW1') who is the director and the operation manager of the plaintiff;

(b) Kiu Chiong Ming ('PW2') who is the managing director of the plaintiff and the father of PW1;

(c) Captain Hj Jamhari bin Sedal ('PW3') who was the captain of vessel RUSILLAH 1 on the date of the alleged incident of collision;

(d) Ku Lai King ('PW4') who was the technical superintendent of the plaintiff; and

(e) Dansstan Lo'Ai Maga ('PW5') who was another director of the plaintiff and its related companies (also doing despatch work for the plaintiff).

[7] The plaintiff's version of the events in the morning of 31 March 2008 about the incident of the collision between the two vessels are stated in the evidence of PW1, PW2 and PW4 (as in the witness statements marked 'PW1 — Evidence in Chief', 'PW2 — Evidence in Chief' and 'PW4 — Evidence in Chief').

[8] According to PW1 on 31 March 2008 at about 7am she received a phone call from PW3 who was the captain of RUSILLAH 1 asking for permission to berth alongside EUREKA III for a couple of days. PW1 also testified that PW3 informed her that RUSILLAH 1 was shifting from JKR jetty to the jetty where EUREKA III was berthed. At that material time EUREKA III was berthed

along the jetty behind UMW yard and beside Mayland Shipyard. PW1 also said at that material time there were crews on board of EUREKA III who were Indonesians and now had left the employment of the plaintiff untraceable todate. At around 8am, said PW1, she received a call from PW4 informing her that RUSILLAH 1 had rammed into EUREKA III during its attempt to berth alongside it. PW1 then immediately informed her father (PW2) about it and they went to the wharf. Upon arrival at the wharf PW1 saw RUSILLAH 1 was berthed at Mayland Shipyard beside another vessel 'Master 1' which is about 10 metres away from EUREKA III. PW1 testified further that PW3 was called to the deck of EUREKA III and had admitted to the collision in the presence of PW2, PW4 and the Indonesian crews of EUREKA III. PW3 had in fact, according to PW2, given him a contact number of the defendant's representative known as 'Yong', and when contacted through phone by PW2, had promised to make arrangement to repair the damages to EUREKA III that had been caused by RUSILLAH 1. However, since the defendant subsequently did not make arrangement to do the repairs as promised, the plaintiff took action to arrest RUSILLAH 1 in order to secure his action against it ie the present admiralty action in rem PW5 (witness statement marked 'PW5 — Evidence in Chief') lodged a police report at Miri Central Police Station on 2 April 2008 regarding the collision upon instruction of PW2 after the defendant was said to have reneged his promise to repair EUREKA III.

[9] On the other hand the defendant called one witness ie Darshan Singh a/l Harjan Singh ('DW1') (witness statements marked 'DW1 — Evidence in Chief') to prove their case that there was no collision or friction between RUSILLAH 1 and EUREKA III and/or to disproof the plaintiff's allegation of the collision between the two vessels. Apart from that, evidence of DW1 did not show any proof for the defendant's counterclaims. The defendant did not call any other witness to support their counterclaims against the plaintiff but depended on their cross-examinations of the plaintiff's witnesses since the plaintiff's claims and the defendant's counterclaims are conducted in one trial, so said counsel for the defendant.

[10] Substantially the evidence of DW1 is that in the morning of 31 March 2008 he was on board of RUSILLAH 1 checking the vessel's engine and generator. At about 7am–8am. DW1 was having his breakfast on board of RUSILLAH 1 which was steered by PW3 (Captain Jamhari bin Sedal). DW1 testified that there was no collision or friction between RUSILLAH 1 with EUREKA III or with any other vessel whatsoever during the berthing process of RUSILLAH 1. To this extent the evidence of DW1 who is an eyewitness is consistent with the evidence of PW3 who also testified that whilst he was steering RUSILLAH 1 to berth alongside EUREKA III he did not realise or feel RUSILLAH 1 had knocked or collided into any other vessel.

[11] PW3 being the plaintiff's witness, as I have mentioned earlier, had contradicted the case for the plaintiff in respect of the collision between the two vessels. But the irony of the evidence of this witness is that he testified, when he was steering RUSILLAH 1 to berth alongside EUREKA III that morning there were only three other crews who were all Indonesians and now untraceable. On this point it appears that PW3 had contradicted the evidence of DW1 who said he was on board of RUSILLAH 1 at that material time.

[12] Facing situation of a witness such as PW3, I have scrutinised his evidence with great care and I found that PW3's evidence was actually not very conclusive in respect of whether there was collision or not between RUSILLAH 1 and EUREKA III when he testified that he did not feel or realise if there was such collision. He was only informed by the crews of EUREKA III that there was a dent on EUREKA III caused by RUSILLAH 1 after he had berthed the vessel. Therefore at best, I ruled, his evidence is neutral on this point and hence evidence of DW1 prevails over PW3's evidence since the evidence of DW1 is positive on this point and I have no reason to disbelieve DW1.

[13] Coming back to the evidence for the plaintiff in respect of the collision between the two vessels, other witnesses for the plaintiff namely PW1, PW2, PW4 and PW5 did not witness the alleged collision. PW1, PW2 and PW4 only heard of this from the crews of EUREKA III who were all Indonesians and are now untraceable. Since the plaintiff could not positively adduce evidence that there was collision between RUSILLAH 1 and EUREKA III, I ruled that this assertion on this issue has not been proven on the balance of probability. Evidence of PW5 on this issue is not supportive on its value.

[14] Be that as it may, the plaintiff through its managing director (PW2) has taken action to arrest RUSILLAH 1 based on his bona fide believe that RUSILLAH 1 had collided into EUREKA III at that material time. It is my finding of facts from the evidence adduced in this trial that the arrest of RUSILLAH 1 was not done in bad faith or with malice. This is due to the facts that, there were damages to EUREKA III, PW3 had called PW1 that morning asking permission to berth RUSILLAH 1 alongside EUREKA III and PW4 had informed PW1 about the collision after he was informed about it by the Indonesian crews of EUREKA III when he went to the wharf. Also, to my mind the omissions on the part of the plaintiff:

(a) to make entry in the logbook of vessel EUREKA III regarding the collision as required under ss 199(1)(m) and 253(1) of the Merchant Shipping Ordinance 1952 ('MSO');

(b) to lodge a collision report to the Marine Department as statutorily required under s 255 of the Merchant Shipping Ordinance;

(c) to adopt the protocol practice of sending to the other party a notarised protest note of the collision;

(d) failure to produce surveyor's report from an independent ship surveyor of the damage and report for the purposes of the ship's classification society,

at best tantamount to failure to proof its case but hardly can be said that the plaintiff had acted with mala fide or with malice to arrest RUSILLAH 1. The arrest of RUSILLAH 1 is necessary in this circumstance to avoid it from setting sail and nowhere to be found subsequently which entails the action to be taken by the plaintiff to become an exercise in futility.

[15] I find support of this findings from *The owners of cargo lately laden on board the 'Euroexpress' v The 'Euroexpress' (owner of) (Banque Indosuez & Anor, interveners)* [1988] 3 MLJ 367 where Wee Chong Jin CJ speaking on behalf of the Court of Appeal Singapore said:

> It may well be that ultimately the appellant's claim may fail but that is not the test of whether they had acted in 'bad faith'. The claimants are entitled to arrest a vessel or other such property as is permitted to obtain security for the claim. It cannot be argued that the arrest is made in 'bad faith' merely because there is good defence to the claim. In our opinion, for an arrest to be in bad faith, there must be same element in the arrester's conduct, for example, where the arrest is in relation to a malicious claim, or is of itself malicious, apart from the proper enforcement of his claim. In our judgment, no such suggestion had or could have been advanced.

[16] Similarly it was also held in *Ocean Gain Shipping Pte Ltd v Owner and/or charterer of demise of vessel Dong Nai registered at Haiphong Port, Vietnam (the Dong Nai)* [1996] 4 MLJ 454, that damages for wrongful arrest may only be awarded where on the evidence tendered, the court found that malice had been established against the plaintiffs.

[17] Sad to say, the defendant in the case at hands has not presented any evidence at all after considering the evidence in its totality at this trial to establish mala fide or malice or *crassa negligentia* implying malice on the part of the plaintiff. The defendant was merely relying on cross-examinations of the plaintiff's witnesses to rebut the plaintiff's case which did not prove the defendant's assertion and did not produce other positive evidence (for example, through their own witness) to prove their assertions in their counterclaims. Therefore I find that the defendant also had failed on balance of probability to prove their counterclaims. The facts that the plaintiff failed in their action does not automatically make the defendant had proven wrongful arrest of their vessel (see also the cases of *Lee Wong Yu & Ors v The owners of the ship or vessel, 'MV Hua Hong Satu'* [1999] 6 CLJ 197; *The Maule* [1995] 2 LRC 192 (Hong Kong Court of Appeal); *Centro Latino Americano de Commercio Exterior SA v Owners of the ship 'Kommunar' (the 'Kommunar') (No 3)* [1997] 1 Lloyd's Rep

22; *The 'Loon Sheng'; Eng Hong Trading Co Sdn Bhd v The 'Loon Sheng' owners & Ors* [1979] 2 MLJ 179; *Walter Turnbull and others v The owners of the ship 'Strathnaver', her cargo and freight* (1875) 1 App Cas 58 and *Xenos v Aldersley (The Evangelismos)* (1858) 12 Moo PCC 352).

[18] In conclusion, base on the foregoing reasons I ruled in this case that the action by the plaintiff is dismissed with costs to be taxed unless agreed. Counterclaims by the defendant is also dismissed with costs to be taxed unless agreed (I informed the parties, this would be tantamount to the parties to bear their own costs). The security deposit amounting to RM229,000 to be refunded to the defendant by the court forthwith.

Plaintiff's action dismissed with costs to be taxed; defendant counterclaims dismissed with costs to be taxed.

Reported by Kohila Nesan